UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 840

Case No. 920: MUCINO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Samar Sen, First Vice-President; Mr. Mikuin Leliel Balanda, Second Vice-President;

Whereas at the request of José Luis Muciño, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal until 31 December 1995 and 31 March 1996;

Whereas, on 28 March 1996, the Applicant filed an application requesting the Tribunal, inter alia, to find:

"...

(a) That the Administration's course of action of arbitrarily transferring the Applicant to another post which was subsequently abolished and which resulted in the termination of his permanent contract was in bad faith and in violation of United Nations Staff Rules and Regulations;

(b) That the Administration failed to consider [the] staff member for another suitable post as required under staff rule 109.1(c) ...

9. ... to order:

(a) That the unanimous recommendation of the Joint Appeals Board be implemented by the Secretary-General which calls for reinstatement of the Applicant retroactive to 1 April 1994, with full salary and benefits and, to compensate him for the painful mental ordeal caused by the Administration's arbitrary decision which terminated his contract, the Organization should pay the Applicant an additional sum of two months' net salary.

In the alternative:

(b) That if reinstatement is denied, that the Secretary-General compensate the Applicant for the injuries sustained as a result of the Administration's arbitrary decision to terminate his contract and its failure to act in accordance with United Nations Staff Rules and Regulations, by paying the Applicant the equivalent of five-years' pensionable remuneration, in addition to the termination indemnity of 21 months plus accumulated leave."

Whereas the Respondent filed his answer on 16 January 1997;

Whereas the Applicant filed written observations on 30 May 1997;

Whereas, on 14 July 1997, the Tribunal put questions to the Respondent, to which he provided answers on 16 July 1997;

Whereas the Applicant submitted additional comments on 17 July 1997;

Whereas, on 24 July 1997, the Tribunal requested the Respondent to provide it with further information, which the Respondent did, on 30 July 1997;

Whereas, on 30 July 1997, the Applicant submitted additional comments;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Development Programme (UNDP) in Mexico City, Mexico, on 17 July 1972, on a three month fixed-term appointment, as a Chauffeur, at the G-2, step I level. His appointment was subsequently renewed for

successive fixed-term periods. With effect from 1 January 1997, he was promoted to the G-3 level and, on 17 July 1978, was granted a permanent appointment. That year, he assumed new duties and his functional title was changed to Administrative Clerk. In 1981, he was promoted to the G-4 level. He remained in the Administrative Clerk post, or in similar positions, until 1988, when he became Finance Clerk.

On 1 November 1988, the Applicant was assigned to the G-5 post of Finance Clerk (Cashier) (Post No. MEX-025-DA-G-E), a position which he held until mid-1993, when his post was abolished. The Applicant subsequently served as a Secretary (Post No. MEX-040-DE-G-E) and was paid from extra-budgetary funds until 31 March 1994, when his permanent appointment was terminated and he was separated from the Organization.

From July 1973 through June 1978, while serving as a Chauffeur, the Applicant consistently received "very good" overall ratings. In his service as an Administrative Clerk or in similar posts, he consistently received overall ratings of "a competent and well-qualified staff member whose performance meets expected standards." In April 1985, the UNDP-Mexico Resident Representative (the UNDP Resident Representative), recommended the upgrading of the Applicant's post and his promotion to the G-5 level based on his "outstanding performance". In 1990, the Applicant received all "very good" individual ratings, as a Finance Clerk. No overall rating was given. During 1991, the Applicant was rated as "meet[ing] the expectation of the performance plan (3)". In 1992, the Applicant was rated as "meet[ing] some of the expectations of the performance plan but ... need[ed] improvement (4)", a rating which was accepted by the Comité de Gestión. The Applicant's performance from February 1993 to January 1994 was rated as having "[f]ully met the expectations of the Job Description and the Individual Performance Plan".

The January 1993 UNDP-Mexico Staffing Table for Locally Recruited Staff lists the Applicant as encumbering the post of Finance Clerk (Post No. MEX-025-DA-G-E). Another staff member is listed as occupying the post of Registry Clerk (Post No. MEX-023-DA-G-E).

On 26 March 1993, the UNDP Resident Representative wrote to the Regional Director, Regional Bureau for Latin America and the Caribbean (RBLAC), UNDP, attaching a list of the "extra-budgetary posts, including post number and functional title, before and after budget strategy exercise." Included among the seven "Non-Core" posts listed under the portion entitled "After Budget Strategy" was Post No. MEX-023-DA-G-E, Registry Clerk.

On 31 March 1993, the UNDP Resident Representative wrote to the Applicant, advising him that his periodic salary increment from the G-4, step 10 level to the G-4, step 11 level, effective 1 April 1993, would not be paid, due to his 1992 performance appraisal review (PAR) rating of "4".

On 12 April 1993, the UNDP Resident Representative advised the Applicant that, based on the results of his 1992 PAR, the Comité de Gestión had recommended that consideration be given to assigning him to another section in order to help him improve his work. The UNDP Resident Representative informed the Applicant that his assignment to the post of Administrative Clerk/Registry would occur in June 1993, with a trial period to commence on 15 April 1993.

On 19 April 1993, the Applicant wrote to the Director, Division of Personnel, UNDP, stating that he had received a copy of his 1992 PAR on 31 March 1993, and expressing his comments on and objections to various statements contained therein.

On 31 May 1993, the Representatives of the Executive Committee of the Staff Association of UNDP wrote to the Comité de Gestión, contesting the "4" rating given in the Applicant's 1992 PAR and requesting reconsideration of the decision not to grant the Applicant his periodic salary increment.

According to the UNDP-Mexico Staffing Table and the Audit Report printout dated 1 October 1993, covering the July-September 1993 quarter for Locally Recruited Staff, the Applicant held the post of Finance Clerk, Post No. MEX-025-DA-G-E and another staff member held the post of Registry Clerk, Post No. MEX-023-DA-G-E. A UNDP Personnel Action Form signed by the UNDP Resident Representative on 12 October 1993 showed the Applicant's functional title as Finance Clerk, Post No. MEX-025-DA-G-E.

On 18 November 1993, the UNDP Resident Representative wrote to the Applicant, referring to their 28 September 1993 meeting when he had advised the Applicant that, "for budgetary reasons", his contract would be terminated as a result of a request from UNDP Headquarters involving the abolition of several posts. The UNDP Resident Representative offered the Applicant two proposals for an agreed termination: (1) special leave with full pay and (2) a lump sum payment. The UNDP Resident Representative and UNDP Headquarters recommended the lump sum payment, which would result in termination indemnities equivalent to 22.5 months, plus 60 days of accumulated leave.

On 20 December 1993, the Chief, Staffing Section, Division of Personnel, UNDP, wrote to the UNDP Resident Representative, advising him that the Applicant's request for 27 months of separation indemnity could not be granted "since the Organization [could] only offer indemnities in conformity with the Staff Rules [and] Regulations".

On 23 December 1993, the UNDP Resident Representative wrote to the Applicant, outlining the Administration's offer for an "agreed separation", (i.e., 12 months' salary as a termination indemnity under staff regulation 9.1(a), an additional six months' salary of exceptional indemnification under staff regulation 9.3(b), three months' salary in lieu of notice under staff rule 109.3(c), and paid accumulated annual leave up to a maximum of 60 days). He further advised the Applicant that, in the absence of an agreed

separation, the post held by the Applicant (Administrative Clerk/Registry) would still be abolished as of 1 January 1994.

According to a Personnel Action Form dated 11 January 1994, the Applicant was placed against the extra-budgetary post of Secretary (Post No. MEX-040-DE-G-E) as of 1 January 1994, pending confirmation of the agreed termination.

According to the UNDP-Mexico Staffing Table and the Audit Report dated 19 January 1994, covering the October-December 1993 quarter for Locally Recruited Staff, the Applicant held the post of Secretary, Post No. MEX-040-DE-G-E and another staff member held the post of Finance Clerk, Post No. MEX-025-DA-G-E. Post No. MEX-023-DA-G-E does not appear in the Staffing Table.

On 7 March 1994, the Regional Director, RBLAC, UNDP, wrote to the UNDP Resident Representative to discuss the need, for budgetary reasons, to eliminate two core posts in the UNDP Mexico office, with effect from 31 December 1993. He stated that the Registry post occupied by the Applicant was to have been cancelled with effect from 31 December 1993. The Regional Director sought confirmation that the post had been abolished and that the occupant of the post, i.e., the Applicant, had ceased to perform the functions of the office and had been separated from service.

On 16 March 1994, the Applicant wrote to the Administrator, UNDP, requesting an administrative review of the decision to separate him from the Organization. In the event he were to be terminated, he asked for a termination indemnity of "27 months of salary plus vacations", rather than 21 months plus vacations.

On 25 March 1994, the Chief, Staffing Section, Division of Personnel, UNDP, informed the Officer-in-Charge, UNDP-Mexico, that a decision had been made to terminate the Applicant's permanent appointment under staff regulation 9.1(a) for abolition of his post, with effect from 31 March 1994. The Chief reiterated that the Applicant would be entitled to payment of three months' net base

salary in lieu of notice, termination indemnities equivalent to 18 months' net base salary, and payment in cash for up to 60 days' accumulated annual leave.

On 28 March 1994, the UNDP Resident Representative wrote to the Applicant confirming that the post of Administrative Clerk/Registry had been abolished with effect from 31 December 1993. He further confirmed that the Applicant would cease to carry out his functions on 31 March 1994. The UNDP Resident Representative repeated the Administration's earlier offer of a termination indemnity consisting of 18 months' salary, three months' salary in lieu of notice, and a maximum of 60 days of accumulated annual leave.

On 19 April 1994, the Chief, Legal Section, Division of Personnel, UNDP, informed the Applicant that the Administration had decided, after an administrative review, to maintain its decision regarding the amount of the lump sum separation indemnity and to confirm the decision not to grant him a salary increment in 1993.

The August 1994 UNDP-Mexico Staff Table for Locally Recruited Staff listed another staff member as holding the post of Finance Clerk, Post No. MEX-025-DA-G-E.

On 5 July 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 15 March 1995. Its considerations and recommendations read, in part, as follows:

> "...
>
> 29. ..., the Panel found that the Appellant never encumbered the Registry Clerk post, Post No. MEX-023-DA-G-E. The official documents showed the Appellant as encumbering other posts; no official document demonstrated that the Appellant ever encumbered the Registry Clerk post. When weighed against this official documentation, the Panel found the informal note to the file, which stated only that a PAF needed to be done and did not appear to inform the Appellant or anyone else of such reassignment, and the 12 April 1993 letter to the Appellant, which did not refer to a post number, to be insufficient to support the Respondent's

position that the Appellant had encumbered the Registry Clerk post (Post No. MEX-023-DA-G-E). The Respondent asserted that 'the administrative delay in updating the official record of the office is not a material omission'. The Panel disagreed. The Panel found reassignments of other staff members reflected in the FOST [Field Office Staffing Table] reports and only the Appellant's alleged assignment to the Registry Clerk post appeared to have been omitted. The Panel found this omission to be highly significant because it was as a result of this alleged assignment that the Appellant's permanent contract was terminated.

30. Having found that the Appellant had never encumbered the Registry Clerk post, Post No. MEX-023-DA-G-E, the Panel concluded that there was no basis to terminate his permanent appointment for abolition of post under staff regulation 9.1 and staff rule 109.1. The Panel thus found that the decision to terminate his contract was arbitrary and the termination was invalid.

31. The Panel next addressed the Appellant's claim that the Administration knew in March 1993, prior to the UNDP Mexico Resident Representative's 12 April 1993 letter advising him that he would be assigned to the Registry Clerk post, that such post would be abolished.

...

33. ... certain core posts, including the Registry Clerk post, became 'non-core' posts after the March 1993 budget strategy and thus had to be financed by extra-budgetary funds. The Panel thus found that, when the Administration notified the Appellant of his proposed assignment to the Registry Clerk post, the Administration was aware that such post was no longer a core post, was dependent on extra-budgetary sources, and therefore, was in jeopardy. The Panel did not find, however, that at that time the Administration had already decided that the Registry Clerk post would be abolished. The Panel further determined that, even though the Administration did not officially transfer the Appellant to the Registry Clerk post, the Administration should not transfer a permanent staff member from a core post to a 'non-core' post dependent on extra-budgetary sources.

34. Lastly, the Panel addressed the Administration's compliance with staff rule 109.1(c), which, in connection with the abolition of posts and reduction of staff, states that, '... subject to the availability of suitable posts in which their services can be effectively utilized, staff

members with permanent appointments shall be retained in preference to those on all other types of appointments' with due regard being given to 'relative competence, to integrity and to length of service'. In its 13 February 1995 memorandum, the Panel requested the Administration to provide evidence of its efforts to place the Appellant against suitable core posts prior to his termination. The Representative of the Secretary-General advised:

> '... Appellant was considered for all suitable core posts ... consistent with staff rule 109.1(c). This Rule refers to "relative competence" and "integrity" as well as "length of service". Appellant was found not to have the competence or skills for each of a number of posts because of his lack of a working knowledge of English. Thus, he could not have been placed against the posts of Secretary, Administrative Clerk or Programme Assistant. Nor could he have been placed against his former post of Finance Clerk, given the circumstances which led to his transfer from that post in the first place. This involved, among other things, the failure of the Appellant to reconcile an error in the petty cash fund until two months after the fact. ... Other positions which were found not suitable were those below Appellant's grade level.'

35. While taking note of the Respondent's position that the Appellant lacked the English language skills necessary for a number of posts, including the posts of Secretary and Administrative Clerk, the Panel was not provided with evidence to demonstrate that the Administration had made serious efforts to place the Appellant against suitable core posts or had given the Appellant full and fair consideration for such posts. For example, among the 'suitable core posts' for which the Appellant was said to have been considered was an Administrative Clerk post at the G-4 grade. Such post was occupied in January 1994 by a staff member on a fixed-term appointment. The Panel observed that the Appellant had satisfactorily performed in an Administrative Clerk or similar post from 1976 to 1988, and had been promoted from the G-3 to G-4 grade while serving in such posts. Absent evidence to the contrary, therefore, the Panel considered that the Appellant could have performed the functions of such post and, based on staff rule 109.1, should have been retained in preference to the staff member on a fixed-term appointment. Likewise, if the Administration could transfer the Appellant to an extra-budgetary Secretary post (Post No. MEX-040-DE-G-E), it was unclear why the Appellant could not have been appointed to a core Secretary post, one of

which was occupied by a fixed-term staff member who had previously encumbered the abolished Registry Clerk post. Accordingly, the Panel found that the Administration had failed to fulfil its obligations under staff rule 109.1(c).

36. Although the Panel concluded that the Administration had no basis upon which to terminate the Appellant for abolition of post, the Panel noted that the termination indemnity of 21 months of pensionable remuneration offered to the Appellant, plus accumulated annual leave up to a maximum of 60 days, appeared to represent the maximum amount payable to terminated staff members under the Staff Regulations and Rules.

37. With respect to the damages claimed by the Appellant, i.e., 'an amount equivalent to the salary and benefits he would have received had he remained with UNDP until he reached 60 years of age', the Panel recognized that, in a period of down-sizing and 'global budget-cutting', even a permanent staff member cannot be assured of a post until retirement. Taking this into consideration, as well as judgements of the Administrative Tribunal involving the wrongful denial of a career appointment or an invalid termination, in which damages of up to three years' net base salary had been awarded, the Panel determined the amount of two years' pensionable remuneration, in addition to the termination indemnity of 21 months plus accumulated leave, should be paid to compensate the Appellant for the injuries he sustained and will sustain if he is not reinstated.

Recommendations

38. The Panel unanimously recommends that the Secretary-General reinstate the Appellant retroactive to 1 April 1994, with full salary and benefits and, to compensate him for the painful mental ordeal caused by the Administration's arbitrary decision which terminated his contract, recommends that the Organization pay the Appellant an additional sum of two months' net salary.

39. If the Secretary-General decides not to reinstate the Appellant, to compensate him for the injuries sustained as a result of the Administration's arbitrary decision which terminated his contract and its failure to act in accordance with staff regulations and rules, the Panel recommends that the Organization pay the Appellant two years' pensionable remuneration, in addition to the termination indemnity of 21 months plus accumulated leave."

On 27 June 1995, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "The Secretary-General has examined your case in light of the Board's report. While he recognizes that certain minor administrative lapses occurred in your case, they were not so significant as to invalidate, in the context of retrenchment, the efforts made by UNDP to place you against a suitable core post; nor to nullify the fact that you discharged actually the functions of Registry Clerk and received on-the-job training.
>
> For the foregoing reasons, the Secretary-General has decided to reject the Board's recommendations contained in paragraphs 38 and 39 of its report.
>
> Nevertheless, the Secretary-General decided to substantially improve the financial terms of your separation. In this regard, the Secretary-General noted that if UNDP had paid you a separation benefit in a lump sum, you would have been entitled to receive the equivalent of 21 months of salary, plus your accrued 60 days of annual leave, totalling [Mex]N$[Mexican new peso]144,880.12. This lump-sum formula would have ended immediately all your other employment benefits on 31 March 1994. The separation package which the Secretary-General has now decided to pay you (...), will cost UNDP [Mex]N$236,831.92, and will ensure that you will be bridged into early retirement at age 55 in May 1996 with full medical and pension contributions until that date. The Secretary-General considers that this enhanced separation package certainly goes a long way to meeting the amount of separation indemnities which you initially requested and on the basis of which you were prepared to separate from UNDP in Mexico in March 1994."

On 28 March 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration's actions of transferring the Applicant to another post, which was then abolished and which

resulted in the termination of his permanent contract, were taken in bad faith and violated the Staff Regulations and Rules.

2. The Administration failed to consider the Applicant for another suitable post, as required by staff rule 109.1(c) in the event of an abolition of post or reduction of staff and involving a staff member with a permanent appointment.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's appointment on account of abolition of post was within the authority of the UNDP Administrator and was properly motivated.

2. Although there are no written records of the efforts to find the Applicant another post, the compensation offered by the Respondent adequately compensates the Applicant for that failure or for any unfairness he may have suffered.

3. The Applicant has failed to discharge the burden of proof on a staff member alleging prejudice to establish such prejudice.

The Tribunal, having deliberated from 14 July to 1 August 1997, now pronounces the following judgement:

I. The Applicant had served as a Finance Clerk/Cashier (Post No. MEX-025-DA-G-E) since 1988 and in mid-1993 was purportedly assigned to the post of Administrative Clerk/Registry (Post No. MEX-023-DA-G-E), a post that was abolished with effect from 31 December 1993. The Applicant subsequently encumbered the post of Secretary (Post No. MEX-040-DA-G-E), an extra-budgetary post, until 31 March 1994, when he was separated from service because of the abolition of the post of Administrative Clerk/ Registry. The January 1993 Mexico Staffing Table listed the Applicant as the incumbent of the Finance Clerk/Cashier post;

another staff member was listed as encumbering the post of Administrative Clerk/Registry. The Applicant's transfer to the post of Administrative Clerk/Registry was to occur in June 1993, with a trial period to commence on 15 April 1993, but there is no Personnel Action Form documenting his transfer to, or occupation of, this post. In addition, the Mexico Staffing Table for October 1993 has listings similar to those of January 1993, which appear to be inconsistent with the Applicant's assignment to the post of Administrative Clerk/Registry in June 1993. The Applicant's Personnel Action Form of 12 October 1993, stated that his functional title was "Finance Clerk/Cashier". Although the abolition of the post of Administrative Clerk/Registry did not take effect until 31 December 1993, a memorandum of 26 March 1993 listed extra-budgetary or "non-core" posts before and after the budget strategy exercise. Before the budget exercise, there were two non-core posts, of which one was Post No. MEX-040-DE-G-E, "Secretary"; after the budget exercise, there were seven such posts, including Post No. MEX-023-DE-G-E, listed as "Registry Clerk".

II. From the documents before the Tribunal, it is clear that not only did the Applicant never encumber the post of Administrative Clerk/Registry, but that at the time he was purportedly assigned to it, it was an extra-budgetary or non-core post. In the light of the foregoing, the Tribunal concurs with the JAB that the Applicant's contract was never properly terminated because the Administration attempted to effect his termination by abolishing a post that the Applicant did not encumber and leaving intact the post that he continued to encumber.

III. The Tribunal believes that the Respondent's attempt to assign the Applicant to a post that the Respondent had already decided was "non-core", must also be questioned, particularly as the Applicant, on all the documentary evidence, still encumbered his original post.

It was only in the Mexico Staffing Table of 19 January 1994 (covering the period October-December 1993) that another staff member was listed as encumbering the post of Finance Clerk/Cashier. The Tribunal finds that the foregoing gives rise to a perception that the Applicant was treated unfairly, not merely because there was an effort to assign him to a non-core post, but also because, strangely, the relevant documents were silent as to what was in fact occurring. The situation is exacerbated by the Applicant's final assignment to the post of Secretary, a post paid for from extra-budgetary funds, with all the attendant insecurities that such an arrangement implies.

IV. The Respondent concedes that "certain administrative lapses occurred in [the Applicant's] case." Even if the Tribunal were to accept this description of what occurred, it considers that the career of any staff member is of such significance to that staff member that "lapses" of such importance should not occur. The Respondent's behaviour was such that the Tribunal cannot accept his submission that these "lapses" were not sufficiently significant to taint his decision.

V. Further, the Respondent concedes that there are no written records of his efforts to find the Applicant another post. The Tribunal must repeat that in a matter fundamental to the Applicant, the very least that should be expected was a written record of such endeavours. The history of the steps taken by the Respondent in his efforts to terminate the Applicant's appointment, his failures and so-called "lapses", shows that they were such as to imply arbitrariness and unfairness on the part of the Respondent.

VI. The Tribunal put questions to the Respondent in order to clarify the amount of compensation that the Applicant had actually received, pursuant to the Secretary-General's decision on the

recommendation of the JAB. In reply, the Respondent has asserted that the Applicant has been paid the sum of MexN$236,831.92. The Tribunal is satisfied that, under the circumstances, the amount paid demonstrates a sincere effort by the Respondent to compensate the Applicant for the wrong done to him.

However, in view of the prejudicial nature of the Respondent's conduct towards the Applicant, the Tribunal considers that the Applicant is entitled to further compensation. The Tribunal assesses the amount of this compensation at six months of the Applicant's net base salary at the rate in effect on the date of his separation from service.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant, in addition to the sum due to the Applicant pursuant to the Secretary-General's decision of 27 June 1995, an amount equal to six months of his net base salary at the rate in effect on the date of his separation from service.

All other pleas are rejected.

(Signatures)

Hubert THIERRY
President

Samar SEN
First Vice-President

Mikuin Leliel BALANDA
Second Vice-President

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary